COURT'S ORDER WHETHER THE CASE IS OR IS NOT APPROVED FOR REPORTING

{Chapter VIII, Rule 32(2)(b)}

Description of the Case.

Criminal Jail Appeal No.345 of 2001
(Old No. 1943 of 1986)

Jabbar and others

...Appellants

Versus

State

.....Opposite Party

(2) Criminal Jail Appeal No. 346 of 2001
(Old No. 1944 of 1986)

Naresh and others

....Appellants

Versus

The State

... Opposite Party

Counsel for appellants –
(1) Sri Sandeep Tandon
(2) Sri A.K. Gautam
(3) Sri R.P. Nautiyal

Counsel for respondent – Sri Nandan Arya, learned AGA for State

Approved for reporting.
~~Not approved for reporting~~.

Date: April 26, 2007

(Dharam Veer, J.)

IN THE HIGH COURT OF UTTARAKHAND,
AT NAINITAL

Criminal Appeal No. 345/2001
(Old No. 1943/1986)

1- Jabbar @ Gullu S/o Sher Singh
2- Naresh S/o Sher Singh
3- Naresh S/o Munnu Ram
4- Digambar S/o Rup Ram
All residents of Village Ambiwala
P.S. Prem Nagar,
District Dehradun..... Appellants.

Versus

The State. ..... Respondent.

AND

Criminal Appeal No. 346/2001
(Old No. 1944/1986)

1- Naresh S/o Munnu Ram
3- Naresh S/o Sher Singh
4- Digambar S/o Rup Ram
All residents of Village Ambiwala
P.S. Prem Nagar,
District Dehradun ..... Appellants.

Versus

The State. .... Respondent.

Mr. Sandeep Tandon, Advocate for accused Naresh S/o Sher Singh.
Mr. A.K. Gautam, Advocate for accused Naresh S/o Manno Ram.
Mr. R.P. Nautiyal, Advocate for accused Digambar.
Mr. Nandan Arya, learned A.G.A. for the State.

Hon'ble Dharam Veer, J:

Both these criminal appeals, U/S 374 Code of Criminal Procedure (hereinafter referred as the "Cr.P.C.") have been preferred by the appellants against the judgment and order dated 15-7-1986 passed by Additional Sessions Judge, Dehradun, in Sessions Trial No. 22 of 1981, whereby all the accused/appellants

were held guilty of the offences U/Ss 399 I.P.C. and 402 I.P.C. and all of them were sentenced to undergo R.I. for six years U/S 399 I.P.C. and four years R.I. U/S 402 I.P.C. The accused/ appellants Jabber, Naresh S/o Sher Singh and Naresh S/o Munnu were further held guilty for the offence U/S 25 Arms Act and all the three were sentenced to undergo R.I. for one year. However, all the sentences were directed to run concurrently. As both the appeals arise out of the same judgment, therefore, the appeals are decided by this common judgment.

2- At the outset it may mentioned that accused/appellant Jabbar @ Gullu has died on 16.12.2003 in police encounter, hence vide order dated 27-2-2007 passed by this court, appeal preferred by the accused/appellant Jabbar @ Gullu stands abated.

3- Briefly stated the prosecution story is that on 24-11-1980 S.I. Mam Chand, S.I. D.K. Tyagi, S.I. Surendra Sharma, S.I. Subhash Kajla and S.I. V.K. Upadhyaya left in search of wanted criminals and to raid illicit distillation of liquor from Police Station Kotwali, Dehradun. They went to Police Out Post Basant Vihar and took two police constables with them from there and then proceeded to village Ambiwala via Prem Nagar. When the raiding police party reached in the outer part of village Ambiwala, an informer told S.I. Mam Chand that four or five mischievous persons have assembled at the covered well in Ambiwala Tea Estate and they intend to commit dacoity in the house of Manager Raj Pal Singh. This information was given at 21.25 P.M. S.I. Mam Chand divided the force into three parties, one headed by Mam Chand, having the two constables and the

informer, the other headed by S.I. Subhash Kajla and the third headed by S.I. V.K. Upadhyaya. The policemen left the jeep near Village Ambiwala and proceeded towards the well. The police personnel took positions after taking search of each other. The informer pointed to the mischievous persons assembled at the well telling S.I. Mam Chand the these are the dacoits. One of the dacoits said that they have enough arms and ammunitions it is time to move and they should proceeded to commit dacoity at the house of Manager Raj Pal Singh. Thereupon S.I. Mam Chand challenged them and fired two shots from his VLP Gun. All the three parties rushed towards the dacoits and at about 21.45 P.M. four out of five persons were arrested, and the fifth person escaped behind the bushes and could not be apprehended. The arrested persons were searched. One country made pistol 12 bore, 2 live cartridges 12 bore, match-box and a bundle of Biris were recovered from the possession of accused Jabbar; one muzzle loading gun single barrel with ammunitions and caps of cartridges were recovered from the possession of accused Naresh S/o Sher Singh; one country-made pistol and two live cartridges were recovered from the possession of accused Naresh S/o Munnu Ram and a Khukari and Biri bundle were recovered from the possession of accused Digambar. All the recovered articles were sealed separately and recovery memos, Ext. Ka.1 to Ka.4 respectively were prepared. The raiding party also found some pieces of Biris and burnt match-sticks from the place of the occurrence. All the recovered articles viz. bundles of Biris, match box, pieces of Biris and burnt match-sticks were kept together in a cloth and recovery memo Ext. Ka.8 was prepared. The police parties along with the above miscreants returned to the

police station Kotwali and oral F.I.R., Ext. Ka.6 was lodged there.

4- The investigation of the case was entrusted to S.I. Bhupal Singh. On 25.11.1980 he recorded the statements of Head Moharir Badri Singh, S.I. Mam Chand, S.I. Surendra Sharma, S.I. V.K. Upadhyaya and other witnesses. On 28-11-80 he visited the spot along with S.I. Mam Chand and prepared site plan, Ext. Ka. 10. He obtained sanction, Ext. Ka. 15 to 17, for prosecution under section 25 Arms Act from the District Magistrate and after completion of investigation submitted charge sheet Exts. 11 to 14 against the accused/appellsnts.

5- The Chief Judicial Magistrate, Dehradun vide his order dated 29-1-1981 committed the case to the Court of Sessions for trial.

6- The learned Sessions Judge, framed charges U/Ss 399/ 402 I.P.C. against all the accused persons. Accused Jabbar, Naresh S/o Sher Singh and Naresh S/o Munnu Ram were also charged U/S 25 Arms Act. The accused persons denied the charges and claimed to be tried.

7- The prosecution, in order to prove its case, examined in all three witnesses. Of these, P.W.1 S.I. Mam Chand and P.W.2, S.I. Virendra Kumar Upadhyaya are the eye witnesses of the incident, whereas P.W.3, S.I. Bhupal Singh is the Investigating Officer of the case.

8- P.W.1, S.I. Mam Chand, along with S.I. D.K. Tyagi, S.I. Surendra Sharma, S.I. Subhash Kajla and S.I. Virendra Kumar Upadhyaya and two constables had arrested the accused persons and had seized the

arms and ammunitions from their possessions. P.W. 1, S.I. Mam Chand and P.W.2, S.I. Virendra Kumar Upadhyaya have narrated the prosecution story.

9- P.W.1, S.I. Mam Chand has deposed that on 24.11.80 he was posted as Second Officer, P.S. Kotwali. On that day at about 21.35 P.M. near Village Ambiwala an informer told him that four or five dacoits are assembling in order to commit dacoity in the house of Manager Raj Pal Singh. This witness was told that these persons have assembled at the well in the tea estate. S.I. Mam Chand further deposed that he divided the police force into three parties and all of them searched each other to ensure that no one had any illicit arms. In the first party this witness S.I. Mam Chand was the incharge; the second party was in the charge of S.I. Surendra Sharma and the third party was headed by S.I. V.K. Upadhyaya. This witness further stated that he sent S.I. D.K. Tyagi to the house of Raj Pal Singh, Manager of the Tea Estate for his safety and two constables were also sent with him. He instructed the policemen not to open fire till he gives order for the same. All the three parties took positions at their appointed places and the informer pointed out the dacoits to this witness. This witness further deposed that he had seen four or five persons assembled at the well and one of them had told that they have sufficient arms and ammunitions and enough time has passed, they should proceed to commit dacoity in the house of Raj Pal Singh. This witness challenged the dacoits demanding surrender and fired two shots of VLP which lit-up the area. All the three parties rushed towards the dacoits and captured four persons, while one managed to escape. The arrested persons disclosed their names. He has

further deposed that one country-made pistol 12 bore, two live cartridges 12 bore, one match-box and a bundle of Biris were recovered from the possession of accused Jabbar; one muzzle loading gun single barrel plus its ammunitions and caps of cartridges were recovered from the possession of accused Naresh S/o Sher Singh; one country-made pistol and two live cartridges were recovered from the possession of accused Naresh S/o Munnu Ram and a Khukri was recovered from the possession of accused Digambar. According to this witness the recovered articles were sealed separately and separate recovery memos were prepared. This witness has proved the recovery memos Ext. Ka.1, Ka. 2, Ka.3 and Ka.4, in respect of the articles recovered from the accused Jabbar, Naresh S/o Sher Singh, Naresh S/o Munnu and Digambar respectively. He further deposed that few pieces of Biris and burnt match-sticks were also recovered from the place where the accused were sitting and its memo, Ex. Ka.8 was proved. This witness has proved the countrymade pistol and 2 live cartridges recovered from accused Jabbar as material exhibits 1 to 3 respectively; muzzle loading gun single barrel plus its ammunitions and caps of cartridges recovered from the possession of accused Naresh S/o Sher Singh as material exhibits, 4, 5 and 6 respectively; country-made pistol and two live cartridges recovered from the possession of accused Naresh S/o Munnu Ram as material exhibits 7, 8 and 9 resepctively; Khukhari material exhibit-10 recovered from the possession of accused Digambar and also proved the Biri bundles, match box and pieces of Biris and burnt match-sticks as material exhibit-11. He further proved the sample seal, Ext. Ka.5. This witness also deposed that on 25.11.1980, at 12.50 A.M. he had lodged oral F.I.R. at

the Police Station, Kotwali. He has proved the chick F.I.R. Ext. Ka.6.

10- P.W.2, S.I. Virendra Kumar Upadhyaya has fully supported the version given by P.W.1, S.I. Mam Chand. He has reiterated the story as narrated by P.W.1, S.I. Mam Chand. P.W.2, S.I. Virendra Kumar Upadhyaya also proved the empty cartridges of VLP which were taken into possession. He also proved the memo, Ext. Ka.7 of taking into possession the empty cartridges of VLP. This witness also proved the recovery memo of Biri Bundles, match box, pieces of Biris and burnt match-sticks, Ext. Ka.8 and sample seal, Ext. Ka. 5. He further proved memo Ext. Ka.9 prepared by the I.O. with regard to taking custody of the torches, which were used by the policemen at the time of the occurrence.

11- P.W.3, S.I. Bhupal Singh, has investigated the case. He has narrated about the steps taken by him during the investigation. This witness has proved the site plan, Ext. Ka.10. He also proved the sanction, Ext. Ka. 15, to launch prosecution under Arms Act for the recovery of one country-made pistol 12 bore, two live cartridges 12 bore, recovered from the possession of accused Jabbar; sanction Ext. Ka.17 to launch prosecution for the recovery of one muzzle loading gun single barrel plus its ammunitions and caps of cartridges recovered from the possession of accused Naresh S/o Sher Singh and sanction Ext. Ka.16 to launch prosecution for the recovery of one country-made pistol and two live cartridges recovered from the possession of accused Naresh S/o Munnu Ram. He has also proved charge sheet Ext. Ka.11, Ka.12, Ka. 13 and

Ka.14 submitted by him after completing the investigation.

12- The accused/appellants in their statements U/S 313 Cr.P.C. have denied the prosecution allegations and have submitted that they have been falsely implicated due to enmity. No evidence, oral or documentary, has been adduced in defence.

13. The learned Sessions Judge, on hearing the learned counsel for the parties and perusing the material on recorded came to the conclusion that the prosecution has been successful in proving its case against the accused/appellants and accordingly convicted all the accused persons U/Ss 399 I.P.C. and 402 I.P.C. and all of them were sentenced to undergo R.I. for six years U/S 399 I.P.C. and four years R.I. U/S 402 I.P.C. The accused/ appellants Jabbar, Naresh S/o Sher Singh and Naresh S/o Munnu were further held guilty for the offence U/S 25 Arms Act and all the three were sentenced to undergo R.I. for one year. However, all the sentences were directed to run concurrently.

14- Feeling aggrieved, the accused/appellants have come up in appeal before this Court.

15- I have heard Sarva Sri Sandeep Tandon, Mr. A.K. Gautam and Mr. R.P. Nautiyal, Advocates for the appellants and Sri Nandan Arya, learned A.G.A. for the State and have gone through the evidence on record.

16- The first argument raised on behalf of the appellants counsel is with regard to non-taking of independent public witness by the police to witness the occurrence. According to the learned defence counsel, there are residential quarters near the place of occurrence and the police have not made efforts to

procure public witness of the occurrence, even the so called informer, has not been produced and the interested testimony of the police personnel is not trustworthy and cannot be taken reliable so as to convict the accused/appellants.

17- The above mentioned submission has got no force. Chick F.I.R., Ext. Ka.6 has mention that Tara Chand and Govind Singh were asked by the police raiding party to witness the occurrence and recovery of the incriminating articles from the possession of the accused persons but they declined to become the witness. Both the eye witnesses, P.W.1, S.I. Mam Chand and P.W.2, S.I. V.K. Upadhyaya have also narrated this fact in their on oath statements and I see no good ground to disbelieve this part of their statement. It is not uncommon for persons to avoid being witness to the arrest of dacoits assembled at a particular place with intent to commit dacoity. The declining of being public witness to involve himself in a case of this nature is not unreasonable and unusual. The informer, although with intent to eliminate the dacoits, gives information about their secret plans, but due to their fear do not want to come to light so as to depose against them in court. In the instant case it has amply been proved that the police party on receiving information from an informer, about the dacoity plan of the accused rushed at the spot, arrested the dacoits and made efforts to make Tara Chand and Govind Singh, public witnesses but they declined. This fact has been corroborated by the recital of chick F.I.R., which was lodged at the Police Station soon after the occurrence.

18- It is well settled that a reliable and trustworthy testimony of a police personnel cannot be thrown out if the same is corroborated by other factors. In the instant case, both P.W.1, S.I. Mam Chand and P.W.2, S.I. V.K. Upadhyaya have given a categorical statements about the factum of arrest, recovery of arms and ammunition and the way how the police party arrived at the place of occurrence and other surrounding circumstances. Nothing material has been suggested to these eyewitnesses, as to why the police would have falsely implicated the accused/appellants in the case. General suggestions have been given to these witnesses that the accused have been falsely implicated due to enmity. Further the recovery of arms and ammunitions from the possession of the accused/appellants strengthen the theory of preparation of dacoity by the accused/appellants at the house of Manager Raj Pal Singh.

19- The next argument of the appellants counsel is that there are contradictions in the statements of the eye witnesses and the facts mentioned in the F.I.R. According to learned counsel in the F.I.R. it has been mentioned that one of the dacoits had said that he will go inside the house of Raj Pal Singh and Digambar will remain at the door and Naresh will go on the roof but P.W.2, S.I. V.K. Upadhyaya, has given a different version when he has asserted that the dacoit had said that he will go inside the house and Naresh will remain on the roof of the house. I see no contradiction in the statement of P.W.2 and the F.I.R. In both, the F.I.R. and the statement of P.W.2, it has been said that one of the dacoits will go inside the house and Naresh will go on the roof. Further it has been pointed out that in the F.I.R. it has been asserted that Tara Chand and

Govind Singh were asked to be witnesses of the occurrence but they declined to oblige the policemen and refused to come but in the statement of Mam Chand, P.W.1 it has come that police men had gone to bring Tara Chand and Govind Singh and other witnesses but no one was prepared to come to the spot. Again there is no contradiction in the F.I.R. and the deposition of P.W.1, S.I. Mam Chand, on this point. Both have the common sense that the police personnel made efforts to procure Tara Chand, Govind Singh and other persons, as witness of the incident.

20- The appellants counsel further argued that S.I. V.K. Upadhyaya could not remember the names of the accused persons in whose search he had gone with S.I. Mam Chand and other police personnel. The witness Mam Chand has given the explanation that they had gone to check the illicit distillation around Vasant Vihar and village Ambiwala and they had not gone in search of any particular accused and they were informed about the incident of dacoity by an informer and names of the present accused persons were not acquainted to the police personnel prior to the occurrence. In the aforesaid situation it is not unusual for P.W.2, S.I. V.K. Upadhyaya not to remember the names of the accused as well as the precise details of distance of road and the place of occurrence etc. The said fact do not affect in any way the otherwise reliable and trustworthy depositions of the prosecution witnesses examined in the case.

21- The next submission raised on behalf of counsel of appellants is that when the accused persons were arrested by the police parties, the weapons recovered from their possession were not loaded with

ammunitions, and in this peculiar circumstance it cannot be said that they assembled at the spot and made preparation to commit dacoity at the house of Manager Raj Pal Singh. This submission is misconceived. It has been fully established by the prosecution that the accused/appellants along with one another person, who escaped from the scene of occurrence, had assembled at the well of Tea Estate in the dark hours of the night having country-made pistol, muzzle loading gun, ammunitions, Khukari, the recovery of which has been proved by the eyewitnesses, and they proceeded towards the house of the Manager Raj Pal Singh in order to commit dacoity but in the meantime police personnel pounced upon them and arrested them with arms and ammunitions. The assembling of the accused persons at the place of the occurrence in the dark hours of night having country-made pistols, muzzle loading gun, ammunitions, Khukari etc. and thereafter participating in the crime by dividing the role of each accused persons viz. to go inside the house, to remain at the door and the other to go on the roof, clearly establish the assembling for the purpose to commit dacoty and making preparation to commit dacoity, punishable U/Ss 402 and 399 I.P.C. The fact that the weapons so recovered from the possession of the accused were not loaded with ammunitions do not falsify the prosecution case of assembling and preparation for dacoity. The police eye witnesses have clearly deposed that one of the dacoits had told that they have enough arms and ammunitions and sufficient time has elapsed they should give shape to their plan of committing dacoity at the house of Manager Raj Pal Singh. Further it is the consistent case of the prosecution that one country-made pistol 12 bore, two live cartridges 12 bore, one match-box

and a bundle of Biris were recovered from the possession of accused Jabbar; one muzzle loading gun single barrel plus its ammunitions and caps of cartridges were recovered from the possession of accused Naresh S/o Sher Singh; one country-made pistol and two live cartridges were recovered from the possession of accused Naresh S/o Munnu Ram and a Khukri and Biri bundle were recovered from the possession of accused Digambar and some pieces of Biris and burnt match-sticks were also found lying at the place where the accused persons were assembled and the aforesaid circumstances do not indicate any other purpose of the accused/appellants assembling at the spot, except to commit dacoity. The submission raised in this regard, has no substance and is rejected accordingly.

22- Next argument on behalf of the appellants counsel is that according to the prosecution story, the police parties surrounded the accused and arrested them at about 9.45 P.M. in the night and it was not possible for them to have recognized and hear the conversant of the accused persons from the distant place.

23- Again this submission is without any force. It has come in evidence that when the police parties reached near the well of Tea Estate, where the accused persons were assembled, they heard the conversation of the accused persons. It was dark night and there was no noise and the police personnel had full occasion to hear the conversation of the accused persons. It has come in the statement of S.I. Mam Chand that after they had come out of the village Ambiwala, the informer met them and gave the information regarding the imminent dacoity. It has

come in the evidence of this witness that all around the well there is a garden and the passages near the well and there was barbed wire fencing which was broken at places. Further P.W.3, S.I. V.K. Upadhyaya has fully corroborated the statement of P.W.1, S.I. Mam Chand and P.W.2, S.I. V.K. Upadhyaya about the location of well and garden and the fencing. He has further deposed that there were tea plant bushes. In the site plan, Ext. Ka. 10, same description about the place of occurrence has been described. The prosecution case further is that on receiving information of commission of dacoity, the police left the jeep near Ambiwala village and proceeded towards the well. When they reached near the well the informer pointed to the dacoits assembled at the well and told to S.I. Mam Chand that those are the dacoits and at this point of time they heard one of the dacoits telling that it is time to move and they have enough arms and ammunitions and that they should proceed to commit dacoity at the house of manager Raj Pal Singh. It has further come in evidence that after hearing the conversation of the accused persons to give effect to dacoity, the S.I. Mam Chand challenge the dacoits and fired two shots of VLP gun which lit-up the area. Further the policemen were having torches and they were in a position to recognize and arrest the accused persons. The two empty cartridges of VLP gun fired by Mam Chand were taken into possession vide memo Ext. Ka.7. The I.O. also prepared memo Ext.Ka.9 of taking into possession the torches held by police personnel at the time of the occurrence. The lighting up the area by firing shots from VLP gun and the torches held by the police personnel further strengthen the prosecution case in relation to source of light at the place of occurrence. The above facts and

circumstances clearly establish that the police personnel had full opportunity to hear the conversation of the dacoits.

24- It will not be out of place to mention here that the F.I.R. in the case has been lodged promptly. According to the prosecution case the occurrence took place at about 9.45 P.M. on 24-11-1980 whereas the F.I.R. was lodged at the Police Station by S.I. Mam Chand on reaching there at 12.50 A.M. on 25.11.1980. The distance of place of occurrence from the police station is about 8 kilometers. Therefore, no delay has been caused in lodging the F.I.R. The prompt F.I.R. further strengthen the prosecution version and indicate towards the genuineness of the case.

25- The important aspect of the case is that both the eye witnesses have given the detail of weapons and ammunitions recovered from the accused appellants. There is no contradiction with regard to possession of specific weapon by the accused persons. Both the police eyewitnesses were cross-examined at a length but nothing material has been brought out from their testimony, which may render their testimony unreliable.

26- It is lastly urged that in the case diary mention has not been made that the arms and ammunitions so recovered from the possession of the accused, were shows to the District Magistrate at the time of obtaining sanction for prosecution under the Arms Act and, therefore, the sanction was obtained in a routine way and the same cannot be said to be a valid sanction. This submission has got no force. P.W.3, S.I. Bhupal Singh has deposed on oath that at

the time of procuring sanction he had carried the recovered arms and ammunitions before the District Magistrate and he had shown the same to him. Further the sanction orders, Exts. Ka. 15 to Ka. 17, show that the sanctioning authority has given the description of the articles recovered from each of the accused persons in the sanction orders. It has also been noted in these orders that all the relevant records pertaining to the recovery have been perused by the sanctioning authority.

27- No other point was raised on behalf of the counsel of the appellants.

28- From the above discussion, I come to the conclusion that the prosecution has been successful in establishing the guilt of the accused/appellants for the charges levelled against them. The findings recorded by the trial court are just and proper and need no interference in the appeal.

29- In the result the appeals fail and are liable to be dismissed.

30- Both the appeals are dismissed. The impugned judgment and order dated 15-7-1986 passed by Additional Sessions Judge, Dehradun, in Sessions Trial No. 22 of 1981, whereby all the accused/appellants were held guilty of the offences U/Ss 399 I.P.C. and 402 I.P.C. and all of them were sentenced to undergo R.I. for six years U/S 399 I.P.C. and four years R.I. U/S 402 I.P.C.; the accused/ appellants Jabber, Naresh S/o Sher Singh and Naresh S/o Munnu were further held guilty for the offence U/S 25 Arms Act and all the three were sentenced to

undergo R.I. for one years, is hereby affirmed. However, all the sentences shall run concurrently, as indicated in the impugned judgment.

31- Accused/appellants Naresh S/o Sher Singh, another Naresh S/o Munnu and Digambar are on bail. Their bail bonds are cancelled and sureties discharged. The shall be taken into custody forthwith and sent to jail to serve out the sentences of imprisonment awarded against them. So far as the accused/appellant Jabbar @ Gullu, is concerned, as stated above, he has already died and his appeal stands abated.

32- Let the record be immediately transmitted to the trial court concerned for compliance to be reported to the court within a month.

(Dharam Veer, J.)

Dated: April 26, 2007
ISB